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No. 02-1348

IN THE

Supreme Court of the United States

OLYMPIC AIRWAYS,
Petitioner,

v.

RUBINA HUSAIN, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals For the Ninth Circuit

BRIEF FOR RESPONDENTS

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QUESTION PRESENTED

Whether the repeated insistence by an airline flight attendant that an asthmatic passenger remain in an assigned seat amidst life-threatening smoke—in direct violation of standard industry practice and the policy of her own airline—is an "unusual" occurrence and thus, under the principles established in *Air France v. Saks*, 470 U.S. 392 (1985), constitutes an "accident" for purposes of Article 17 of the Warsaw Convention.

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BRIEF FOR RESPONDENTS

STATEMENT

Dr. Abid Hanson died on January 4, 1998, as a result of prolonged exposure to cigarette smoke on an Olympic Airways international flight. During that flight, an Olympic flight attendant—disregarding both industry practice and the policy of her own airline—insisted that Dr. Hanson remain in his assigned seat near to the hazardous smoke, despite three separate, increasingly urgent requests by Dr. Hanson's wife, respondent Rubina Husain, that he be moved to a seat away from the smoke and despite the availability of empty seats on the flight. Applying the terms of the Warsaw Convention, the district court found that the events causing Dr. Hanson's death were an "accident" under Article 17 of the Convention and that the actions of the flight crew amounted to willful misconduct. The court awarded respondents economic

damages of $1.4 million and non-economic damages in the same amount, with each award reduced by 50 percent because of negligence by Dr. Hanson. The court of appeals affirmed.

A. The events giving rise to this lawsuit took place on Olympic Airways Flight 417 from Athens, Greece to New York City. The flight was the second leg of a return trip following a family vacation. Prior to the first leg, from Cairo, Eygpt to Athens, Ms. Husain had taken direct steps to assure that her husband, who had suffered from asthma for more than two decades, would be seated in a non-smoking area. Returning to the counter after receiving seat assignments, Ms. Husain showed the check-in agent a letter (from Dr. Hanson's brother, a doctor) stating that Dr. Hanson had a history of asthma and specifically asked the agent to ensure that the family members were assigned seats in the non-smoking section. Pet. App. 37a. The flight from Cairo to Athens passed without incident.

At the Athens airport Dr. Hanson experienced difficulty breathing in several smoke-filled waiting areas. Pet. App. 37a. Then, upon boarding the aircraft for New York, Dr. Hanson and his family found that their assigned seats, while in the non-smoking section, were in row 48, just three rows from the beginning of the smoking section. Pet. App. 37a. Ms. Husain promptly approached an Olympic flight attendant, Maria Leptourgou, saying that her husband could not sit near smoke. Having informed her of the problem, Ms. Husain told the flight attendant, "You have to move him." Pet. App. 38a. Ms. Leptourgou rebuffed this effort, directing Ms. Husain to "have a seat." Pet. App. 38a.

This request by Ms. Husain was the first of three unsuccessful efforts to have Dr. Hanson moved to a seat away from the smoking area. The second occurred before takeoff, when Ms. Husain told Ms. Leptourgou that her husband was "allergic to smoke" and "adamant[ly]" sought his assignment to a different, safer seat. Pet. App. 38a. Ms. Husain again

was told that Dr. Hanson could not be moved. This time Ms. Leptourgou informed Ms. Husain that she was busy and that she could not relocate Dr. Hanson because the plane was "totally full." Pet. App. 38a.

The latter statement turned out to be untrue. As evidence later showed, the plane had 422 passenger seats (not counting four seats designated as crew seats) and only 411 passengers. Pet. App. 40a. There were thus 11 empty seats. Furthermore, the flight had 28 non-revenue passengers, a class of passengers that includes Olympic employees and their relatives, as well as employees and their relatives from other airlines. Pet. App. 40a.

After the flight took off and the "no-smoking" sign was extinguished, passengers in the smoking section began to smoke. Pet. App. 39a. To make matters worse, passengers assigned to non-smoking seats went back to the smoking section and began to smoke while standing in the aisles. Pet. App. 39a. As the smoke increased, it drifted forward to the row in which Dr. Hanson and his family were sitting. Dr. Hanson complained to his wife that the smoke was "like a chimney." Pet. App. 39a.

Ms. Husain tried again, now for the third time, to get the flight crew to move Dr. Hanson. Addressing Ms. Leptourgou, Ms. Husain said, "You have to move my husband from here." Pet. App. 39a. Ms. Leptourgou "curtly" refused to do so, repeating her (false) assertion that the plane was full. Pet. App. 39a. The flight attendant did say that Ms. Husain herself could seek out a different seat, but declined to offer any assistance. Ms. Husain then told Ms. Leptourgou that her husband had to move, even if that meant a change to a seat outside the economy cabin. Pet. App. 40a; *see also* Pet. App. 68a ("According to her testimony, Ms. Husain literally *begged* Ms. Leptourgou to move her husband. She told the flight attendant, 'I don't care if the plane is full. Sit him on

the carpet, sit him in first class, but don't sit him here.'") This last, even more desperate, request likewise went unheeded.

The refusal by Ms. Leptourgou to move Dr. Hanson away from hazardous smoke was anything but normal flight crew behavior. Diana Fairechild, an experienced flight attendant and longtime international purser, testified that, under the recognized standard of care in the airline industry, Ms. Leptourgou "should have absolutely responded" to the requests for a seat away from the smoke. Pet. App. 53a. Ms. Fairechild stated: "I've never seen anybody treated like this on an international flight, so it's not—it's not airline service as far as I experienced or I would expect." Pet. App. 71a. Indeed, an Olympic flight attendant testified that the refusal to move Dr. Hanson was contrary to Olympic Airways' own policy, which is to move ill passengers when doing so will assist in their recovery. Pet. App. 53a.

The continued exposure of Dr. Hanson to the surrounding smoke ultimately had tragic consequences. As the smoke persisted during the first few hours of the flight, and then intensified following service of a meal, Dr. Hanson experienced more and more trouble with his breathing. Pet. App. 41a. Dr. Hanson used up one inhaler and asked his wife for a second one, which she retrieved for him. Pet. App. 41a. At several points he looked behind him to see the accumulation of smoke. Pet. App. 41a.

Finally, Dr. Hanson told his daughter that the smoke was bothering his allergies and that he was going to move forward in the cabin in search of fresher air. Pet. App. 41a. Doing so, he reached the galley area between rows 19 and 20. There, he asked his wife to administer a shot of epinepherine, which he carried in an emergency medical kit. Pet. App. 41a. Ms. Husain gave Dr. Hanson the shot, and then went back to the rear of the cabin to get Dr. Umesh Sabharwal, an allergist and family friend who had been traveling with them.

When Dr. Sabharwal reached Dr. Hanson, he found that he was in respiratory distress. Pet. App. 42a. From that point on, Dr. Sabharwal and Ms. Husain used a combination of CPR, medication, and oxygen in an attempt to restore his breathing. Pet. App. 42a-43a. None of the efforts was successful. Dr. Hanson died aboard the flight.

B. Respondents filed suit against Olympic, asserting claims under the Warsaw Convention. *See* Convention for the Unification of Certain Rules Relating to International Transportation by Air, October 12, 1929, 49 Stat. 3000, T.S. No. 876 (1934), 137 L.N.T.S. 11, *reprinted in note following* 49 U.S.C. § 40105 ("Convention").[1] Article 17 of the Convention provides that, subject to possible defenses, an international air carrier "shall be liable for damage sustained in the event of the death . . . of a passenger . . . if the accident which caused the damage so sustained took place on board the aircraft . . . ."

After a several-day trial, the district court found Olympic liable for Dr. Hanson's death on Flight 417. In so doing, the court rejected Olympic's argument that the events leading to Dr. Hanson's death were not an "accident" within the meaning of Article 17. The court first noted that this Court had defined an "accident" as "an unexpected or unusual event or happening that is external to the passenger." Pet. App. 49a (quoting *Air France v. Saks*, 470 U.S. 392, 405 (1985)). The court then found that the repeated refusals to move Dr. Hanson away from the dangerous smoke met that test.

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[1] Respondents originally filed suit in California state court. Olympic removed the action to federal court, 28 U.S.C. §1441, basing federal jurisdiction on the Foreign Sovereign Immunities Act, 28 U.S.C. §1330, and the existence of a federal question, 28 U.S.C. §1331. The district court found subject matter jurisdiction under the Foreign Sovereign Immunities Act. *See* Pet. App. 33a n.1.

The district court identified several grounds for concluding that "Ms. Leptourgou [the Olympic flight attendant] acted in an unexpected and unusual manner. . . ." Pet. App. 52a. To begin with, the court observed, "the recognized standard of care for flight attendants during international air travel demands that a flight attendant make efforts to accommodate a passenger who indicates that he or she needs to be moved for medical reasons." Pet. App. 52a. As a result, Ms. Leptourgou acted outside the scope of normal operations when she refused to relocate Dr. Hanson to an unoccupied seat or to arrange an exchange of seats with a non-revenue passenger. Furthermore, in insisting that Dr. Hanson remain in a hazardous location, Ms. Leptourgou "violated Olympic Airways' policy," which required her to find a less dangerous seat. Pet. App. 53a. At the very least, the court found, the flight attendant should have "alert[ed] the chief cabin attendant . . . of Ms. Husain's medical requests." Pet. App. 54a. Her "blatant disregard of industry standards and airline policies" was enough to constitute an "accident" for purposes of Article 17. Pet. App. 58a.

The district court then found, as Article 17 further requires, that the abnormal conduct of the crew "caused Dr. Hanson's death." Pet. App. 59a. Although Olympic had contended that Dr. Hanson died as a consequence of certain food allergies, the court decided otherwise, stating that "Dr. Hanson's death was caused, at least in significant part, by smoke inhalation which triggered a severe asthmatic reaction." Pet. App. 59a. Again noting the availability of empty seats and seats occupied by non-revenue passengers, the court concluded: "If Ms. Leptourgou had moved Dr. Hanson out of the vicinity of the smoking section, he would not have died aboard Flight 417." Pet. App. 60a.

Finally, the district court found that the continued refusal to help Dr. Hanson amounted to "willful misconduct" under

Article 25 of the Convention.[2] Although it declared that "[t]he plaintiff bears a 'heavy burden' in proving willful misconduct," Pet. App. 66a, the court determined that "at the time of her third refusal to assist Dr. Hanson, Ms. Leptourgou *must have known* that the cabin was not full, that Dr. Hanson had a medical problem and a special susceptibility to smoke, and that her failure to move him would aggravate his condition and cause him probable injury." Pet. App. 67a. In reaching this conclusion, the court found that "Ms. Leptourgou was aware of the industry standard of care," Pet. App. 67a, as well as "Olympic's specific policy requiring that a flight attendant inform [the chief attendant] when a passenger requests a seat transfer for medical reasons." Pet. App. 67a. And, observing that "each of Ms. Husain's requests was more emphatic and desperate than the last," Pet. App. 68a, the court found "that Ms. Husain communicated her husband's problem to the flight attendant so emphatically that Ms. Leptourgou must have recognized the danger." Pet. App. 68a.[3]

C. The court of appeals affirmed. Like the district court, the court of appeals recognized that, to meet the standard of Article 17, respondents had to demonstrate that Dr. Hanson's death was caused by "'an unexpected or unusual event or

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[2] Article 25 of the Convention provides that a carrier may not "avail himself of the provisions of this convention which exclude or limit his liability, if the damage is caused by his wilful misconduct or by such default on his part as . . . is considered to be equivalent to wilful misconduct." In particular, a carrier found to have engaged in willful misconduct cannot invoke the liability caps set forth in Article 22. (Like the courts below, we use the modern spelling of "willful" except when directly quoting Article 25.)

[3] The district court awarded economic and non-economic damages in the amount of $1.4 million apiece. It then reduced each award by 50 percent, pursuant to Article 21, because of negligence by Dr. Hanson in failing to seek out a different seat on his own, after Ms. Leptourgou gave him that option. *See* Pet. App. 74a-75a.

happening that is external to the passenger.'" Pet. App. 10a (quoting *Saks*, 470 U.S. at 405). In holding that respondents had satisfied that requirement, the court of appeals relied heavily on the finding, made by the district court "after examining evidence establishing industry standards and Olympic's policies regarding passengers with medical needs, that this failure to act [*i.e.*, to respond to the requests to move Dr. Hanson] was a 'blatant disregard of industry standards and airline policies.'" Pet. App. 14a. Applying the *Saks* standard, the Ninth Circuit concluded that "[the flight attendant's] conduct was clearly external to Dr. Hanson, and it was unexpected and unusual in light of industry standards, Olympic policy, and the simple nature of Dr. Hanson's requested accommodation." Pet. App. 14a.[4]

The court of appeals then upheld the findings that the conduct of the crew caused Dr. Hanson's death and that the behavior was sufficiently serious to amount to willful misconduct. With respect to the former, while saying that the question was a "close call," Pet. App. 17a, the court noted that "the district court, as the trier of fact, was in the best position to determine which of two plausible explanations [for the cause of death] was correct." Pet. App. 17a. With respect to the latter, the court relied on facts establishing "that Ms. Leptourgou was aware that Dr. Hanson was in a desperate situation that required immediate assistance, yet despite this knowledge and increasingly emphatic pleas from Ms. Husain, Ms. Leptourgou ignored Olympic's policy and industry standards and refused to assist Dr. Hanson." Pet. App. 21a. The court concluded: "This amounts to a dereliction of duty that is not only unusual and unexpected on an international flight, but willful." Pet. App. 21a.

[4] The Ninth Circuit added: "The failure to act in the face of a known, serious risk satisfies the meaning of 'accident' within Article 17 so long as reasonable alternatives exist that would substantially minimize the risk and implementing these alternatives would not unreasonably interfere with the normal, expected operation of the airplane." Pet. App. 14a. We discuss this additional language at pages 26-27 *infra*.

SUMMARY OF ARGUMENT

Article 17 of the Warsaw Convention provides that, subject to certain defenses, an international air carrier "shall be liable" for the death or bodily injury of a passenger if an "accident" caused the death or injury. The events in this case—repeated refusals by a flight attendant to move an asthmatic passenger away from hazardous cigarette smoke, in disregard of usual industry practice and company policy—were an "accident" within the recognized meaning of that standard.

I. The term "accident," in common usage, is understood to refer to "[a]n unexpected, undesirable event" or "[a]n unforeseen incident." *The American Heritage Dictionary of the English Language* at 11 (3d ed. 1992). The same broad meaning applies in a legal context as well. *See, e.g., Cozzie v. Metropolitan Life Ins. Co.*, 140 F.3d 1104, 1109 (7th Cir. 1998). As this Court has observed, "'[s]peaking generally, but with reference to legal liabilities, an accident means any unintended and unexpected occurrence which produces hurt or loss.'" *Air France v. Saks*, 470 U.S. 392, 398 (1985) (quoting *Fenton v. J. Thorley & Co.*, [1903] A.C. 443, 453).

Taken at face value, therefore, the term "accident" has a broad, inclusive meaning. Textual indications in the Convention further support that meaning here. Thus, Article 17 is not limited to particular aviation accidents like aircraft crashes or explosions, but expansively includes accidents that take place "on board the aircraft" and accidents that occur "in the course of any of the operations of embarking or disembarking." Not only does this language reach the kinds of incidental accidents that cause injury to individual passengers, but it naturally connects presumptive liability for

accidents to the time that the airlines exert control over their passengers. Moreover, Article 17 reaches accidents that involve willful misconduct, not just accidents that involve inadvertence. The term "accident" thus appears to encompass, at the very least, a wide range of unusual occurrences with respect to physical operation of the aircraft and the conduct of airline personnel.

Not surprisingly, therefore, this Court has given the term "accident" a full, comprehensive definition. *See Saks*, 470 U.S. at 405-06. Although the Court imposed one necessary limitation—recognizing that, under the wording of Article 17, the "accident" and the resulting death or injury could not be one and the same—it otherwise adopted the common meaning for the term, defining it to mean "an unexpected or unusual event or happening that is external to the passenger." *Saks*, 470 U.S. at 405. It thus foreclosed liability at the Article 17 stage only when a death or injury "indisputably results from the passenger's own internal reaction to the *usual, normal, and expected operation of the aircraft.*" *Id.* at 406 (emphasis added). Furthermore, the Court stressed that its "definition should be flexibly applied after assessment of all the circumstances surrounding a passenger's injuries," *id.* at 405—an admonition that it has since repeated, *see El Al Israel Airlines, Ltd. v. Tseng*, 525 U.S. 155, 165 n.9, 172 (1999)—and declared that "the passenger [need only] be able to prove that some link in the chain [of causation] was an unusual or unexpected event external to the passenger." *Saks*, 470 U.S. at 406.

The definition of "accident" adopted in *Saks* fits closely with the general liability system established by the Convention. That system, as originally constructed, was based upon principles of fault. *See* Lowenfeld & Mendelsohn, *The United States and the Warsaw Convention*, 80 Harv. L. Rev. 497, 498-501 (1967). Given the careful interplay between establishing presumptive liability for "accidents" and allowing carriers to avoid that liability only upon a showing of due care, it is unlikely that the signatories to the Convention intended to relieve carriers of liability for deaths or injuries directly caused by their own misconduct, let alone by their willful misconduct. That result would be all the more improbable given the fact that passengers can obtain recovery under the Convention or not at all. *See Tseng*, 525 U.S. at 167-76.

II. The events on board Olympic Flight 417 were very different from the "usual, normal, and expected operation of the aircraft." *Saks*, 470 U.S. at 406. By refusing to move Dr. Hanson to a less dangerous location, the Olympic flight attendant not only departed from the usual practice in the airline industry, but also ignored the policy of her own airline. As a result, she needlessly confined Dr. Hanson to a smoke-surrounded area where he increasingly could not breathe. That behavior was a direct, material link in the chain of causation that caused Dr. Hanson's death. *See Saks*, 470 U.S. at 406.

The refusal of a flight crew to adhere to its usual practices is a prime example of an "unusual" occurrence: by definition, it is unusual for employees of an airline to decline to do what they usually do. While Olympic argues that an omission, as opposed to an affirmative act, is never an "accident," that theory makes little sense in this context. Even if acts and omissions can be reliably distinguished—a doubtful proposition to begin with—the fact remains that it is "unusual" for a flight crew *either* to do something that it does not normally do *or* to fail to do something that it normally does. And, while tort law may relieve persons of a duty to act in certain circumstances, *Prosser and Keeton on The Law of Torts* § 56, at 375 (5th ed. 1984), that principle generally does not extend to circumstances in which one party exerts custody or control over another. *See id.* at 376-77. That is precisely the situation that exists between airline carriers and their passengers:

as part of air travel, passengers are expected to follow the directions of airline personnel, including directions about where they are to sit.

Treating a departure from industry standards as an "accident" does not, as Olympic contends, import the "due care" defense of Article 20(1) into Article 17. This Court has long recognized that proof of a departure from custom is not the same as proof of negligence. *See Texas & Pacific Ry. Co. v. Behymer*, 189 U.S. 468, 470 (1903) ("What usually is done may be evidence of what ought to be done, but what ought to be done is fixed by a standard of reasonable prudence, whether it usually is complied with or not"); *see also Prosser and Keeton* § 33, at 195. Thus, while the Article 17 inquiry (whether an "accident" occurred) will often be similar to the Article 20(1) inquiry (whether a carrier has exercised "due care")—a point that this Court specifically acknowledged in *Saks*, *see* 470 U.S. at 407—they ultimately ask separate questions and look for separate answers. All that the Article 17 inquiry calls for is evidence that something unusual happened with respect to the flight, a requirement that is readily met by proof that the flight crew deviated from well-accepted practices in the industry.

None of this is altered by the fact that Dr. Hanson had a pre-existing medical condition. Although language in *Saks* bars recovery for an injury resulting from the "passenger's own internal reaction to the usual, normal, and expected operation of the aircraft," 470 U.S. at 406, that language, on its face, does *not* bar recovery for an injury where operation of the aircraft was decidedly abnormal. A pre-existing condition may, of course, affect the factual determination about what *caused* a particular death or injury, making it more likely that the cause was not the "accident" in question. But that contested issue was resolved against Olympic in the courts below.

III. The fact that the Convention provides the only remedy for death or injury may properly be considered in determining whether the signatories intended to give a narrow meaning to the term "accident." In interpreting a treaty, this Court seeks to construe its language in a manner that fits with the objectives of the treaty as a whole. *See Saks*, 470 U.S. at 399. Here, it is difficult to think that the signatories to the Convention meant to bring about a result that would both relieve Olympic of liability for its willful misconduct and leave Ms. Husain without any remedy for her husband's death, all as part of a liability scheme that is generally intended to provide at least some relief for passengers harmed by the fault of a carrier. And it seems particularly doubtful that they would have done so, not by making that point directly, but by depending on an artificially narrow construction of the term "accident."

The post-Convention history cited by Olympic offers no evidence of any such understanding. For the most part, it shows only that the term "accident" is narrower than the terms "event" or "occurrence," a point that this Court already settled in *Saks*. More broadly, however, the post-ratification materials work against the position now advocated by Olympic, revealing a strong trend towards increasing liability even when a carrier is not at fault. The attempt by Olympic to avoid liability for its own misconduct, therefore, is not only contrary to any reasonable reading of the term "accident," it is at odds with the course of post-ratification history as well.

ARGUMENT

It is beyond dispute, at this point, that willful misconduct by the flight crew on Olympic Flight 417 caused the death of Dr. Hanson in the most direct sense: that is, absent the willful misconduct, Dr. Hanson would not have died on that flight. The question, then, is whether the Warsaw Convention makes Olympic liable for that misconduct. Olympic claims that it

does not, arguing that Article 17 of the Convention—which establishes that a carrier is presumptively liable for the death of a passenger if an "accident" caused the death—operates to shield international carriers from liability for certain deaths caused by a failure to act. While acknowledging that this Court has defined the term "accident" to mean "an unexpected or unusual event or happening that is external to the passenger," *Air France v. Saks*, 470 U.S. 392, 405 (1985) (*Saks*), Olympic says that a failure to take action, as opposed to the taking of affirmative action, can never itself be an unexpected or unusual happening or event. According to Olympic, any other reading of Article 17 would improperly import the concept of "lack of due care" into Article 17 where it does not belong.

This argument is wrong on several counts. To begin with, it is directly at odds with the accepted meaning of the word "accident," both as it is typically understood and as it has been construed by this Court. That meaning establishes that an "accident," unless specifically limited by context, is nothing more or less than an occurrence that is abnormal or unexpected. *See Saks*, 470 U.S. at 405. As applied to air travel, therefore, an "accident" is something other than the "usual, normal and expected operation of the aircraft." *Saks*, 470 U.S. at 406. That definition is plainly broad enough to encompass the exposure of a passenger to dangerous conditions as a result of repeated refusals by a flight attendant to follow the regular industry and company practice. By its own terms, the departure by a flight crew from its usual procedures is an unusual event.

Furthermore, this natural application of the term "accident" does not turn on whether the departure from common industry practice is characterized as an affirmative act or as a refusal to act. Even if a coherent distinction can be made between the two categories, the fact remains that a failure to follow a usual course of action can be just as unexpected as

the pursuit of an unusual course. And Olympic is simply incorrect that the inquiry with regard to this kind of "accident" (that an airline did not follow usual custom) is the same as an inquiry with regard to negligence (that the airline acted without reasonable prudence). Although the inquiries are similar, *see Saks*, 470 U.S. at 407, it has long been recognized that they are not identical. *See, e.g., Texas & Pacific Ry. Co. v. Behymer*, 189 U.S. 468, 470 (1903) (Holmes, J.). The judgment below thus was correct, and it should be affirmed.

I. THE TERM "ACCIDENT" IN ARTICLE 17 ENCOMPASSES UNUSUAL ACTS OR OMISSIONS BY A FLIGHT CREW THAT ARE NOT PART OF THE NORMAL OPERATION OF THE AIRCRAFT

A. The basic question in this case is whether the term "accident" in Article 17 of the Warsaw Convention encompasses circumstances in which the refusal of a flight crew to observe standard industry practice directly caused the death of a passenger on an international flight. To answer that question, it is necessary to look first at the meaning of the term "accident" itself. This Court has said that courts interpreting a treaty "'may look beyond the written words [of the treaty], to the history of the treaty, the negotiations, and the practical construction adopted by the parties,'" *Saks*, 470 U.S. at 397 (quoting *Choctaw Nation of Indians v. United States*, 318 U.S. 423, 431-32 (1943)), but it has made clear that "[t]he analysis must begin . . . with the text of the treaty and the context in which the written words are used." *Saks*, 470 U.S. at 396-97; *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 699-700 (1988); *Société Nationale Industrielle Aérospatiale v. United States District Court*, 482

U.S. 522, 534 (1987). The starting point is thus the language of the treaty. *See United States v. Alvarez-Machain*, 504 U.S. 655, 663 (1992).[5]

The critical term here—the word "accident"—has, in common usage, a broad, naturally inclusive meaning. The American Heritage Dictionary, for example, defines "accident" as "[a]n unexpected, undesirable event" or as "[a]n unforeseen incident." *The American Heritage Dictionary of the English Language* at 11 (3d ed. 1992). Other dictionary definitions are to the same effect. *See, e.g., Webster's New World College Dictionary* at 8 (4th ed. 1999) ("a happening that is not expected, foreseen, or intended"); *Webster's New International Dictionary of the English Language* at 15 (2d ed. 1942) ("[a]n event that takes place without one's foresight or expectation"). Furthermore, in ordinary speech, an "unexpected" happening can be either an act or omission or the result of that act or omission. For example, if a cook forgets to turn off a cooking flame, causing a grease fire and then a burned arm, all of the events in that chain of cause and effect—the failure to turn off the flame, the resulting grease fire, and the burned arm—may properly be described as "accidents."

The same broad meaning attaches to the word "accident" in a legal context as well. *See, e.g., Cozzie v. Metropolitan Life Ins. Co.*, 140 F.3d 1104, 1109 (7th Cir. 1998) ("the term 'accident' is not easily susceptible to a limiting principle"). This Court has noted that "'[s]peaking generally, but with reference to legal liabilities, an accident means *any* unin-

[5] The official language of the Warsaw Convention is French, and this Court has said that, in order to identify the shared expectations of the signatories, it is necessary to look to the "French legal meaning" of particular terms. *See Saks*, 470 U.S. at 399. With respect to the term at issue here, however, the Court has observed that "the French legal meaning of the term 'accident' differs little from the meaning of the term in Great Britain, Germany, or the United States." *Id.*

tended and unexpected occurrence which produces hurt or loss.'" *Saks*, 470 U.S. at 398 (quoting *Fenton v. J. Thorley & Co.*, [1903] A.C. 443, 453) (emphasis added). Indeed, Lord Lindley in *Fenton* specifically emphasized that the word could be employed in a number of different contexts, pointing out that it is "often used to denote both the cause and the effect, no attempt being made to discriminate between them." *See Saks*, 470 U.S. at 398 (quoting [1903] A.C. at 453); *Wickman v. Northwestern Nat'l Ins. Co.*, 908 F.2d 1077, 1086 (1st Cir.), *cert. denied*, 498 U.S. 1013 (1990) ("In recent years, courts consistently have rejected the distinction between accidental means and accidental results . . . ."). *See generally Connelly v. Hunt Furniture Co.*, 240 N.Y. 83, 85-89 (1925) (Cardozo, J.) A law dictionary definition, similarly, is far-ranging and inclusive. *See Black's Law Dictionary* at 14 (5th ed. 1979).

Viewed by itself, therefore, the term "accident" would naturally apply to a broad range of "unexpected" or "unforeseen" occurrences. And, with one exception discussed below (*see* page 19 *infra*), that reading is reinforced by other textual indications in the Convention. Thus, for example, while the drafters and signatories of the Convention might have limited the term to specific kinds of unusual aviation events like airline crashes or mid-flight explosions, the language of Article 17 makes clear that they did not do so. By its terms, Article 17 expansively covers accidents that take place "on board the aircraft" and accidents that take place "in the course of any of the operations of embarking or disembarking." This extended reach is significant for several reasons. First, it indicates that the drafters and signatories had in mind those unusual events that take place during the time that airlines exert control over their passengers, reflecting the familiar concept that control and responsibility are interconnected. Second, it brings within the Convention the class of more common "accidents"—often involving airline personnel—

that result in injury to individual passengers, rather than limiting its scope to large-scale incidents affecting passengers on the plane as a whole.

The intended breadth of the term "accident" is also evident from what it does not exclude: intentional misconduct. While "accidents" are sometimes distinguished from acts done "on purpose," *see, e.g., Massachusetts Bay Ins. Co. v. Vic Koenig Leasing, Inc.*, 136 F.3d 1116, 1124 (7th Cir. 1998), it is clear that the use of the term in Article 17 refers to both kinds of unusual happenings. That is because the Convention unmistakably imposes liability (in fact, uncapped liability) for willful misconduct, *see* Convention Art. 25, and there can be no liability at all under the Convention in the absence of an "accident." For purposes of the Convention, therefore, the deliberate striking of a passenger by a flight crew member is regarded as an "accident."

These contextual cues, at the very least, support the notion that the term "accident" broadly includes unusual happenings with regard to operation of the aircraft or the conduct of airline personnel. And, that reading is entirely consistent with the fact that Article 17 uses the term "accident," whereas Article 18, which deals with damage to baggage, uses the different term "occurrence." While the contrast naturally suggests that the two words were intended to have different meanings, that difference is already provided by the accepted usage of "accident" as an *unusual* occurrence. Nothing in the comparison between those terms restricts the types of unusual occurrences that may be considered "accidents" under Article 17.[6]

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[6] Although the drafting history of Article 17 shows that the drafters adopted the term "accident" in place of "occurrence"—as part of a process of breaking up a single Article into several Articles governing passengers, baggage, and delays—the history is equivocal about the reasons for doing so. Thus, while the President of the drafting committee made remarks implying that the changes were more than merely cosmetic, *see Saks*, 470 U.S. at 403, he went on to cast some doubt on that reading, saying: "I add right away that we are still in the same situation; it is not a question of new articles but of a new numbering of the articles." International Conference on Air Law Affecting Air Questions, Minutes, Second International Conference on Private Aeronautical Law, October 4-12, 1929, Warsaw 206 (R. Horner & D. Legrez trans. 1975). At a minimum, this emphasis on "numbering," rather than on the substance of the articles, suggests that the intended difference between "accident" and "occurrence" was meant to be no greater than the difference between an unusual and an ordinary occurrence.

As we have said, however, there is one textual indication that requires an exception to this fully inclusive meaning. For Article 17 does not speak of an "accident" in the abstract, it speaks of an accident that "cause[s]" a death or bodily injury. Giving both words their natural effect, it necessarily follows that a passenger's death or bodily injury cannot itself be the abnormal occurrence. To have an "accident," therefore, *something else* must be unusual on the flight in question.

This Court made precisely that point in *Saks*. There, the Court undertook to resolve a conflict over whether the term "accident" required an unusual happening apart from the occurrence of a death or injury itself. The Court held that it did. Reviewing the language of the convention, as well as its drafting history and subsequent interpretation, the Court held that "liability under Article 17 of the Warsaw Convention arises only if a passenger's injury is caused by an unexpected or unusual event or happening that is external to the passenger." 470 U.S. at 405. It thus concluded that a passenger could not recover for an injury that "indisputably results from the passenger's own internal reaction to the *usual, normal, and expected operation of the aircraft*." 470 U.S. at 406 (emphasis added).

Although Olympic concedes that the *Saks* standard is controlling here, it seems to take the view that the phrase "an unexpected or unusual event or happening" should itself be

subject to a narrowing construction. But *Saks* indicates just the opposite. Having established the standard, the Court took pains to add that its "definition should be *flexibly applied* after assessment of all the circumstances surrounding a passenger's injuries." 470 U.S. at 405 (emphasis added). Moreover, the Court observed that a simple focus on "fortuitous or unpredictable" events—the inquiry that the Court ultimately found to be appropriate—was "in accord with American decisions which, while interpreting the term 'accident' broadly . . . nevertheless refuse to extend the term to cover routine travel procedures that produce an injury due to the peculiar internal condition of a passenger." 470 U.S. at 404-05. Far from suggesting that the term "accident" should be subject to further limitations, this language appears to signal that the term should be interpreted "broadly," *id.*, albeit not so broadly as to create presumptive liability for injuries arising out of "routine travel procedures."

The Court in *Saks* also made clear that an "accident" may consist of both usual and unusual elements. Recognizing the potential for complex disputes about what is or is not unusual, the Court stressed that "[a]ny injury is the product of a chain of causes, and we require only that the passenger be able to prove that some link in the chain was an unusual or unexpected event external to the passenger." 470 U.S. at 406. The relevant "accident" thus need not be the only, or even the last, link in the chain of causation. To satisfy Article 17, it is enough that the unusual occurrence was a contributing factor in the subsequent death or injury.

Finally, the Court in *Saks* explained that there was a difference between the need to demonstrate an unusual occurrence (required by Article 17) and the need to prove negligence (not required by Article 17). *See* 470 U.S. at 407. Although it acknowledged that many airlines had chosen to waive their due care defenses, *see id.*, the Court held that this waiver did not relieve plaintiffs of their Article 17 obligation

to show that something abnormal (other than their injury alone) had happened during the flight. The Court noted that the "accident" requirement and the "due care" defense were "distinct" because the former "is located in a separate article and because it involves an inquiry into the nature of the event which *caused* the injury rather than the care taken by the airline to avert the injury." 470 U.S. at 407. At the same time, however, the Court recognized that "these inquiries may on occasion be similar. . . ." 470 U.S. at 407.

Nothing in the *Saks* analysis, or in the definition that it sets forth, therefore, supports a theory that the term "accident" requires anything more than proof of an unusual occurrence that is outside "the usual, normal, and expected operation of the aircraft." 470 U.S. at 406. That proof may relate to how the carrier operates the physical equipment, or it may relate to how the carrier deals with its passengers. Indeed, just four Terms ago, the Court openly doubted whether the Second Circuit, in a case involving an airline security search, had applied the *Saks* test with sufficient breadth. *See El Al Israel Airlines, Ltd. v. Tseng*, 525 U.S. 155, 165 n.9 (1999). The Court first noted that the district court had employed a "flexible application" in order to find that "'[a] routine search, applied erroneously to plaintiff in the course of embarking on the aircraft, is fairly accurately characterized as an accident.'" *Id.* (quoting 919 F. Supp. at 158). Then, after reviewing the decision of the Second Circuit to reverse that determination, the Court remarked: "It is questionable whether the Court of Appeals 'flexibly applied' the definition of 'accident' we set forth in *Saks*." 525 U.S. at 165 n.9. Later in the opinion, the Court rebuffed a concern that its holding—that the Convention provides the only avenue of relief for deaths or injuries on international flights—would allow carriers to "escape liability for their intentional torts," pointedly observing: "[W]e have already cautioned that the definition of 'accident' under Article 17 is an 'unusual event

. . . *external to the passenger*,' and that '[t]his definition should be flexibly applied.'" 525 U.S. at 172 (quoting *Saks*, 470 U.S. at 405) (emphasis added in *Tseng*).

The *Saks* decision thus interprets the term "accident" in a manner that fully reflects the express terms and overall structure of the Convention. The Court properly limited the scope of the term to the extent required by its immediate context, but made no further inroads on its customary broad meaning. Furthermore, the Court emphasized that the definition should be "flexibly applied," 470 U.S. at 405, a point that it then reiterated in *Tseng*. Those principles are controlling here.

B. This reading also fits with the nature of the liability system as a whole. The Convention is a fault-based system. *See* Lowenfeld & Mendelsohn, *The United States and the Warsaw Convention*, 80 Harv. L. Rev. 497, 498-501 (1967). Given that understanding, it would be highly unnatural to adopt a definition of the term "accident" that, as a practical matter, would allow carriers to escape liability for deaths or injuries caused by their own misconduct. Nothing in the Convention calls for that kind of illogical construction.

There is no serious dispute that the liability system established by the Warsaw Convention is based on principles of fault. *See* Lowenfeld & Mendelsohn, *supra*, at 500 (noting that the Convention "retain[ed] the principle of liability on the basis of negligence"); Weigand, *Accident, Exclusivity, and Passenger Disturbances Under the Warsaw Convention*, 16 Am. U. Intl. L. Rev. 891, 920 (2001) ("the Convention was originally based on fault concepts and set forth a *system* of liability"); *see also* Pet. Br. 15 ("the overall liability system created by the Warsaw Convention is fault based").[7]

[7] For purposes of this discussion, we look primarily at the liability system as it was constructed in 1929, when the term "accident" was made part of Article 17. Although the liability system has changed over the years through a process of amendments and supplemental agreements—primarily in ways that increase the liability of carriers without regard to fault, *see* pages 44-45 *infra*—the signatories to the Convention first used the term "accident" in the context of the original system established by the Convention. *See also* note 17 *infra* (quoting revised Article 17 from 1999 Montreal Convention).

Confronted by a multitude of nations with different liability systems, the drafters of the Convention employed a two-step process of presumption and rebuttal to establish liability. Article 17 embodies the presumption ("[t]he carrier shall be liable . . ."). Thus, to satisfy Article 17, a passenger is required to show only that an "accident . . . caused" the relevant death or bodily injury. Notably, Article 17 does not itself require any showing of fault: it is rather the broad gateway through which passengers' claims, whether fault-based or not, must first pass.

It then falls to the carrier to rebut the presumption of liability if it can. The primary means for doing so, provided by Article 20, is a showing that the carrier was not at fault. *See* Article 20(1) ("[t]he carrier shall not be liable if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures"). But this so-called "due care" defense has an obvious corollary. While Article 20 expressly extinguishes liability upon a showing of proper care, it necessarily *permits* liability for a death or bodily injury if the carrier cannot make that showing.

This carefully-constructed framework makes it highly improbable that the Convention signatories intended, by use of the term "accident," to protect carriers from liability for deaths caused by their misconduct, much less for deaths caused by their willful misconduct. The evident purpose of Article 17 is to bring forward a wide variety of claims for "accidents" involving death and bodily injury, leaving ultimate questions of liability to be resolved under the sub-

stantive standards of Articles 20 (due care), 21 (contributory negligence), and 25 (willful misconduct). While Article 17 does require a plaintiff to show something "unusual" other than the fact of his or her injury, that threshold requirement serves primarily to screen out cases in which there is no possibility of "fault" because nothing out of the ordinary has occurred. It would be very different to use Article 17 to foreclose claims specifically grounded in facts demonstrating that aberrant carrier behavior caused a death or bodily injury during flight.

That result would be stranger still given the fact that passengers have no recourse other than the Convention to obtain relief for a death or injury. *See Tseng*, 525 U.S. at 167-76.[8] Having established an exclusive liability system, it is, at the very least, difficult to see why the signatories would then choose to exonerate carriers for deaths and injuries caused by their fault and almost unimaginable that they would do so solely by a cryptic use of the word "accident" in Article 17. A far more likely explanation, therefore, is that the treaty used the word in its natural, accepted sense—to indicate an unusual or unexpected occurrence with respect to operation of the aircraft—thus placing the burden on carriers to establish that the occurrence could not have been avoided by the exercise of due care. Although carriers cannot be expected to guarantee the safety of every passenger on every flight, they can at least be expected to operate their flights in the "usual, normal, and expected" manner, *Saks*, 470 U.S. at 406, and to show that any harmful deviations from that manner were not the result of inadequate care. That is what the Convention contemplates.

[8] Olympic appears to argue that the decision in *Tseng* is irrelevant to the issue in this case. We address that argument at pages 40-42 *infra*.

II. THE REFUSAL OF AN AIRLINE FLIGHT CREW TO FOLLOW STANDARD INDUSTRY PROCEDURES, WITH THE RESULTING EXPOSURE OF A PASSENGER TO LIFE-THREATENING CONDITIONS, IS NOT PART OF THE NORMAL OPERATION OF AN AIRCRAFT

A. The facts here plainly meet the definition of an "unusual" or "unexpected" occurrence. Although Olympic claims otherwise, the events aboard Flight 417 were anything but the "usual, normal, and expected operation of the aircraft." *Saks*, 470 U.S. at 406.

Most obviously, it was not "normal" for an Olympic flight attendant to refuse to do what international flight attendants typically do: provide an at-risk passenger with a different, less dangerous seat. Testimony at trial indicated, and the district court specifically found, that "the recognized standard of care for flight attendants during international air travel demands that a flight attendant make efforts to accommodate a passenger who indicates that he or she needs to be moved for medical reasons." Pet. App. 52a. The contrary course of action followed here—one that essentially forced Dr. Hanson to remain in an ongoing life-threatening situation—was so out of the ordinary that one witness, an experienced flight attendant and purser, declared: "I've never seen anybody treated like this on an international flight, so it's not—it's not airline service as far as I experienced or I would expect." Pet. App. 71a; J.A. 70 (testimony of Diana Fairechild). Saying that she was "shocked" by the behavior, the witness described it as "criminal." Pet. App. 71a; J.A. 73.

Likewise, it was not "normal" for the flight attendant to disregard the policy of her own airline. Again, testimony indicated that "Olympic crew members generally make efforts to move passengers who become ill during flights if moving those passengers will assist in their recovery," Pet.

App. 53a; J.A. 79 (testimony of Eleni Xourgia), a policy that could readily have been followed here given the availability of empty seats and additional seats occupied by non-revenue passengers. At the very least, Olympic policy requires its attendants to alert the chief cabin attendant of medical requests. *See* Pet. App. 54a. Ms. Leptourgou did neither, electing instead to instruct Ms. Husain that Dr. Hanson could not be moved and that, as far as the airline was concerned, he would have to remain in his seat by the smoking section.

The result of these actions was also far from "normal": by virtue of her refusals, Ms. Leptourgou left an allergic passenger continuously exposed to hours of harmful cigarette smoke. Nor did she do this unwittingly. As the district court found, the number and increasing urgency of Ms. Husain's pleas were fully sufficient to inform Ms. Leptourgou of the medical risks resulting from her behavior. *See* Pet. App. 68a-69a ("Ms. Leptourgou cannot have failed to recognize that Dr. Hanson's problem was a medical one and that sitting near the smoking section was likely to cause him injury"). Yet her response was repeatedly to insist that—unless Ms. Husain herself arranged another seat—Dr. Hanson had to remain where he was.

The refusal by Ms. Leptourgou to heed either industry or company policy is a textbook example of an "unusual" or "unexpected" occurrence. It is, by definition, unusual when the crew of an airline refuses to do what it usually does. Whatever the ultimate scope of the term "accident" may be, it surely encompasses actions—or inactions (*see* pages 30-33 *infra*)—that are directly contrary to common practice in the industry. Under no circumstances can the violation of industry standards be considered "the usual, normal, and expected operation of the aircraft." *Saks*, 470 U.S. at 406.

Olympic, in fact, does not directly argue to the contrary. Rather, it mounts an attack on additional language in the court of appeals' opinion, which provides that "[t]he failure to

act in the face of a known, serious risk satisfies the meaning of 'accident' within Article 17 so long as reasonable alternatives exist that would substantially minimize the risk and implementing these alternatives would not unreasonably interfere with the normal, expected operation of the airplane." Pet. App. 14a. This observation by the Ninth Circuit suggests a potentially broader question: whether the failure of an airline to do something that it arguably should do—but usually does *not* do—also constitutes an "accident" under Article 17. But it is wholly unnecessary to answer that question here. The Ninth Circuit, like the district court, specifically found that the failure to follow "industry standards" and "Olympic policy" was, in and of itself, "unexpected and unusual." *See* Pet. App. 14a; Pet. App. 52a-56a. That reasoning alone is enough to support the judgment below. *See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984) (this Court "reviews judgments, not opinions").[9]

Olympic also argues that the presence of smoke in the cabin was "normal," Pet. Br. 16, apparently meaning to suggest that the entire flight was normal as well. But this assertion ignores two important principles established by *Saks*. Most directly, it ignores the fact that the definition of "accident" does not require every link in the chain of causation to be an unusual event. Rather, as the Court said in *Saks*, it is necessary only "that the passenger be able to prove that *some link* in the chain was an unusual or unexpected

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[9] Even if this case did not involve a violation of industry and company standards, we think that the arguments made by Olympic would be meritless. Although a "failure to act in the face of a known, serious risk" may not always be unusual or unexpected, it is certainly so when action is clearly called for and easily performed. Indeed, Olympic never explains why it would be "expected" for an airline to ignore the medical needs of a passenger when the solution is simply to move him to an available empty seat away from the source of harm.

event external to the passenger." 470 U.S. at 406 (emphasis added). The actions by Ms. Leptourgou in violation of industry standards, by themselves, establish that unusual link.

Olympic disregards a second admonition in *Saks* as well: that the "definition [of 'accident'] should be flexibly applied after assessment of *all the circumstances* surrounding a passenger's injuries." 470 U.S. at 405 (emphasis added). Although Olympic purports to follow that course, it takes much too narrow a view of what "all the circumstances" actually are. While the existence of ambient smoke is certainly one circumstance, there are the added circumstances that Olympic seated Dr. Hanson near to the smoke; that standard industry and company policies were to move him away from the smoke for medical reasons; that Ms. Leptourgou ignored those policies and the policy of communicating medical requests to the chief cabin attendant; and that Dr. Hanson was thus left to sit amidst the dense smoke to the point of respiratory distress. By focusing on the existence of the smoke, Olympic is simply isolating one circumstance from the other circumstances leading to Dr. Hanson's death. That *combination* of circumstances was not, by any reasonable standard, normal. *See Saks*, 470 U.S. at 405 ("In cases where there is contradictory evidence, it is for the trier of fact to decide whether an 'accident,' as here defined, caused the passenger's injury").

Lord Phillips of the Court of Appeal in England made precisely this point in distinguishing the events in this case from those in a case involving a failure to warn passengers of the risk of deep vein thrombosis. *See The Deep Vein Thrombosis and Air Travel Litigation*, [2003] EWCA Civ. 1005, at ¶ 50. Noting that "[t]he direct cause of [Dr. Hanson's] death was the unnecessary exposure to the smoke," *id.*, Lord Phillips pointed out that "[t]he refusal of the attendant to move him could be described as insistence that he remain seated in the area exposed to smoke." *Id.* Lord Phillips then

observed: "The exposure to smoke in these circumstances could, in my view, properly be described as an unusual or unexpected event [under the *Saks* definition]. While smoke in that part of the cabin was not itself unusual or unexpected, the same cannot be said of Dr. Hanson's enforced exposure to that smoke." *Id.* (emphasis added).[10]

Relying on *Krys v. Lufthansa German Airlines*, 119 F.3d 1515, 1521 (11th Cir. 1997), Olympic also argues that Article 17 calls for "a purely factual description of the relevant events." Pet. Br. 24. All that means, however, is that presumptive liability under Article 17 does not turn on legal characterizations about whether the actions of a flight crew were, or were not, negligent. The proper approach is to examine whether the facts demonstrate an unusual occurrence during the flight, not to ask whether that unusual occurrence meets the legal standard for establishing a want of due care. But, in order to make the former inquiry, it is nevertheless necessary for the factfinder to look comprehensively at all the relevant circumstances. Those circumstances naturally may include whether the conduct of the flight crew was in keeping with what a flight crew usually does on a "normal" flight.

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[10]Although the Court of Appeal concluded that the failure to warn about deep vein thrombosis was not an "accident," that result is not at odds with the Ninth Circuit decision here. The parties to *The Deep Vein Thrombosis* case expressly stipulated that "the flight was operated in accordance with all of the Defendant's usual procedures and practices," *id.* at ¶ 6.4(2), and there was no issue with regard to departure from general industry standards. Furthermore, while Lord Phillips did place some weight on the fact that a failure to warn is an "omission," he agreed that "the distinction between acts and omissions can in some circumstances be dubious" and explicitly stated that "*Husain* . . . is an example of such circumstances." *Id.* at ¶ 62. *See* pages 30-33 *infra*.

In short, there was an "accident" on board Flight 417. Faced with two possible courses of action, Ms. Leptourgou chose to disregard standard industry and company practice, consigning Dr. Hanson to a seat where he could not breathe. That unusual, and unfortunate, action ultimately cost him his life.

B. Olympic resists this conclusion on several grounds, all of them unpersuasive. To start with, it advances the stark proposition that while an affirmative act may itself be an "accident" (for example, a flight attendant assaulting a passenger), an omission can *never* be an "accident." Pet. Br. 18. But this "bright line" between acts and omissions makes little sense. First of all, the line is anything but bright. As the facts in this case demonstrate, what happens during an airplane flight can often be characterized as either an act or an omission, without any meaningful difference between them. Thus, the events in this case can be described as either a refusal to reseat Dr. Hanson or an insistence that he remain where he was (absent self-help), and further described as either a failure to act in accordance with standard practice or as the taking of actions contrary to standard practice. The difference to be derived from these descriptions, if there is a difference at all, is immaterial.

The invitation to make difficult distinctions between acts and omissions also misses the basic point established in *Saks*. The critical question for purposes of identifying an "accident" is whether something unusual happened with respect to the flight, not whether it took a particular form. Looked at that way, it seems clear that a departure from usual procedures is an unusual or unexpected event, regardless of how it is characterized. Thus, if a flight crew normally follows certain procedures, the failure to follow them is unusual; conversely, if a crew typically does not do something, it is unusual suddenly to do it. Even leaving aside hard questions of

categorization, the theory that acts in derogation of policy are unusual, but omissions in derogation of policy are not, is unfounded.[11]

The Convention itself makes no explicit distinction between acts and omissions, at least insofar as the ultimate issue of liability is concerned. Article 25, for example, provides that the liability caps of Article 22 shall not apply in the event of "wilful misconduct or . . . *such default* on [the carrier's] part as, in accordance with the law of the court to which the case is submitted, is considered to be equivalent to wilful misconduct." *Id.* (emphasis added). Likewise, Article 20(1) makes clear that the "due care" defense is unavailable when a carrier has failed to (*i.e.*, omitted to) take "all necessary measures to avoid the damage." Thus, under the Convention, default or inaction by a carrier is as much a basis for liability as improper actions.

It is true that the law of torts historically recognized that persons have no general duty to aid other persons in distress, *see* Restatement (Second) of Torts § 314 (1965); *Prosser and Keeton on The Law of Torts* § 56, at 375 (5th ed. 1984) (*Prosser and Keeton*), but that doctrine is no help to petitioner here. Whatever its overall merits may be, it is well recognized that the "no duty to aid" concept is generally inapplicable where one party exerts custody or control over the other. *See* Restatement (Second) of Torts § 314A (1965); *Prosser and Keeton* § 56, at 376-77. That is precisely the

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[11] The distinction would also lead to bizarre results. Thus, if a passenger simply took another seat without permission, and was ordered to return to his assigned seat despite his allergy to smoke, that order would clearly be an "affirmative act" under the view urged by Olympic. Yet, the effects of that conduct would be just the same as the effects here: Olympic would still have violated industry and company practice, and the passenger would still have been forced to sit amidst hazardous cigarette smoke. It is irrational to think that Olympic should be liable in one case, but not the other.

relationship between carriers and passengers on international flights: the carrier is in control of the flight, and passengers must conform their behavior to its governing rules and regulations. Indeed, passengers that violate those rules may be subject to arrest and prosecution. *See* 49 U.S.C. § 46504 (prohibiting "interfer[ence] with the performance of the duties" of a flight crew or attendant by means of assault or intimidation).

The control exercised by a carrier applies with particular force to seating aboard the aircraft. Unless the carrier permits open seating, where passengers are free to select their own seats upon boarding, a passenger is expected to sit in the seat to which he or she has been assigned by the carrier. Although a passenger may request particular seating, it is ultimately up to the carrier to decide where he or she must sit. Likewise, a passenger wishing—or, like Dr. Hanson, needing—to change seats is dependent upon the carrier to bring that change about.

Against this backdrop, it is implausible to think that the signatories to the Convention adopted a liability system permitting carriers simply to ignore passengers that need assistance. Not only would that be a strikingly harsh position, but it would endorse an approach to safety on the part of international air carriers that would be difficult to justify as a matter of sound practice. Furthermore, that view of the treaty-created liability system would be in tension with the fact that the Convention provides for liability from the point of embarkment to the point of disembarkment, a decision indicating that the signatories recognized a connection between a carrier's control over its passengers and potential liability for their deaths or injuries. Although there will inevitably be issues with regard to how far a duty to assist passengers should extend, it hardly seems unreasonable to expect that carriers at least will provide routinely available assistance to passengers in medical distress, and the industry has developed a general practice of doing so. By following

that practice, the airlines are simply acknowledging that the exercise of control over their passengers—a necessary aspect of their business—carries with it certain obligations with respect to how those passengers are treated.

Amicus curiae Air Transport Association of America, Inc., insists, however, that, if airlines must hew to industry standards, that obligation "will discourage airlines from undertaking efforts to protect passengers or to prevent foreseeable injuries." ATA Br. 14 n.12; *see also id.* ("the standard in the industry will become simply to make no effort to do so"). The accuracy of this claim is plainly open to question, given the likely public reaction to, and commercial effects of, any collective decision by airlines to reduce safety measures. Furthermore, we doubt that a policy of not having policies would actually work as a method of defeating liability under the Convention. *See* note 9 *supra*. But, in any event, the failure to observe industry standards does not itself make carriers liable for causing death or bodily injury: at most, it means that plaintiffs, having satisfied the threshold requirements of Article 17, are entitled to the benefits of presumptive liability, subject to whatever defenses the carriers are able to assert. *See* pages 33-37 *infra*. And, of course, the carriers still have the advantage of limiting any eventual recoveries according to the ceilings that the Convention imposes.

C. Treating a departure from industry standards as an unusual event does not, as Olympic contends (Pet. Br. 25-28), import the "due care" defense of Article 20(1) into the liability provisions of Article 17. Olympic has simply misunderstood the difference between the proof needed to show abnormal conduct during a flight (the "accident") and the often similar proof needed to show fault on the part of the carrier (the "lack of due care").

The point here is a well-accepted one in the law of torts: a plaintiff does not establish negligence merely by showing that

the defendant failed to adhere to a common practice, just as the defendant does not automatically avoid a finding of negligence by showing that it did adhere. Indeed, this Court expressly recognized that basic principle more than a century ago. *See Texas & P. Ry. Co.*, 189 U.S. at 470. There, Justice Holmes, writing for the Court, observed: "The charge [to the jury] embodied one of the commonplaces of the law. What usually is done may be evidence of what ought to be done, but what ought to be done is fixed by a standard of reasonable prudence, whether it usually is complied with or not." *Id.*; *see also Wabash R. Co. v. McDaniels*, 107 U.S. 454 (1883). The same law is commonplace today. *See, e.g.*, Restatement (Second) of Torts § 295A (1965); *Prosser and Keeton* § 33, at 195 ("[A]s a general rule, the fact that a thing is done in an unusual manner is merely evidence to be considered in determining negligence, and is not in itself conclusive"); *L&C Marine Transport, Ltd. v. Ward*, 755 F.2d 1457, 1463 (11th Cir. 1985) ("Custom is not dispositive in negligence actions"); *Institute of London Underwriters v. Eagle Boats, Ltd.*, 918 F. Supp. 297, 300 (E.D. Mo. 1996) (evidence of custom and usage "does not set the legal standard of care"); *Doe v. American National Red Cross*, 848 F. Supp. 1228, 1233 (S.D. W.Va. 1994) ("Customary practice does not prescribe the duty of care").

The reasons for this doctrine are readily apparent. Whatever common practice may be, it does not necessarily correlate with the legally appropriate standard of care. *See, e.g., Anderson v. Malloy*, 700 F.2d 1208, 1212 (8th Cir. 1983) ("Evidence of the customs and practices of a trade or industry does not establish the legal standard of care to which a party is held"). Thus, even though a defendant may have fully complied with industry custom, that custom may itself fall short of the standard of due care. *See, e.g., SEC v. Dain Rauscher, Inc.*, 254 F.3d 852, 856 (9th Cir. 2001). On the other hand, a defendant may have failed to live up to an industry standard that goes beyond the basic requirements of due care, so that a plaintiff proving noncompliance has not, by that proof alone, shown actual negligence. *See, e.g., Anderson v. Malloy*, 700 F.2d at 1212 ("Nor does the fact that a person deviated from or conformed to an accepted custom or practice establish conclusively that the person was or was not negligent"); *Easterly v. Advance Stores Co., Inc.*, 432 F. Supp. 7, 9 (E.D. Tenn. 1976) ("[C]ustom is not conclusive on the issue of due care or lack of it. Conformity with custom is some proof of due care, and nonconformity some proof of negligence") (internal quotation marks omitted).[12] In either case, it remains for the courts to decide what the law does, or does not, require. *See The T.J. Hooper*, 60 F.2d 737, 740 (2d Cir. 1932) (L. Hand, J.) ("Courts must in the end say what is required").

Naturally enough, evidence about abnormal behavior will often be *relevant* to the ultimate inquiry about due care, *see, e.g., Prosser and Keeton* § 33, at 195; *Colorado Mill. and Elevator Co.*, 350 F.2d at 278, but that fact does not make the inquiries the same, only similar. Indeed, this Court expressly recognized the potential overlap between the two issues in *Saks*. The Court first declared that "[t]he 'accident' requirement of Article 17 is distinct from the defenses in Article 20(1)," 470 U.S. at 407, pointing out that one "involves an inquiry into the nature of the event which *caused* the injury rather than the care taken by the airline to avert the injury."

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[12] The first example, not unexpectedly, is more common than the second because it is more likely for industry standards to be set too low than too high. Nonetheless, it remains the plaintiff's burden to show that the failure to meet industry standards amounts to an absence of reasonable care. *See Colorado Mill. & Elevator Co. v. Terminal R.R. Ass'n of St. Louis*, 350 F.2d 273, 278 (8th Cir. 1965) ("This Court and others have many times held that proof of custom while relevant and admissible in evidence of negligence is not conclusive thereof").

In the very next sentence, however, the Court went on to observe that "these inquiries may on occasion be similar . . . ." *Id.*

Olympic quotes only the first sentence in its brief, neglecting the second. But this edited version distorts the point that the Court was making. Thus, while an inquiry under Article 17 is undeniably "distinct" from an inquiry under Article 20—in the sense that a plaintiff has the *lesser* burden of having to prove only an unusual event, not a lack of care—it is to be expected that the inquiries will often look quite alike. After all, both require a kind of comparison: Article 17 calls for a comparison between what happened and what would be usual or expected, while Article 20 calls for a comparison between what happened and what should have happened with the exercise of due care ("all necessary measures"). At bottom, however, the Article 17 and Article 20 inquiries ask separate questions and thus require separate answers.[13]

Olympic apparently would prefer to shut off any Article 17 inquiry into what a flight crew usually does. But it seems self-evident that, in order to identify abnormal events or happenings, *Saks*, 470 U.S. at 405, there must be a benchmark regarding what is normal. Here, we are simply saying that one benchmark for judging "the usual, normal and expected operation" of an aircraft is the standard of behavior observed by flight crews within the industry or, alternatively,

[13] Although the questions and answers are separate, that does not mean that they must always require different proof. It is one thing to say that proof of negligence is not *necessary* to satisfy Article 17, quite another to say that it is not *sufficient*. Indeed, it seems obvious that the failure of a carrier to exercise due care will often be something other than the "normal" operation of an aircraft. And, it would be strange indeed if a carrier could use the fact that its behavior was so abnormal as to be negligent as the very reason for insisting that an injured passenger be denied recovery. Given the facts here, however, the Court need not reach this issue.

within the particular carrier itself. As we have noted, *see* page 27 *supra*, that benchmark requires no judicial speculation about what those practices ultimately should be. Instead, it takes account of what is typically done, and recognizes that a departure from that regular behavior is "unusual." That is sufficient to establish an "accident" under Article 17.

D. Olympic also places great emphasis on the fact that Dr. Hanson had a pre-existing allergy to cigarette smoke. But this fact is fully compatible with the conclusion that an "accident" occurred on board Flight 417. In its argument, Olympic is essentially mixing up the question whether there has been an "accident" with the question whether the "accident" caused his death. Those are separate issues, and the courts below properly resolved both of them against Olympic.

The decision in *Saks*, in fact, makes quite clear that a passenger's pre-existing medical condition does not preclude a finding that an "accident" occurred aboard her flight. In determining that Ms. Saks could not recover for her hearing loss, the Court held only that a carrier is not liable for an injury resulting "from the passenger's own internal reaction to the usual, normal, and expected operation of the aircraft." 470 U.S. at 406. Thus, to foreclose liability at the Article 17 stage, there must be two separate determinations: *first*, an "internal reaction" and, *second*, "the usual, normal, and expected operation of the aircraft." Nothing in *Saks* says that an "internal reaction," by itself, precludes recovery, even when that reaction was directly caused by the unusual operation of the flight (an "external" event). Indeed, the unstated premise of that decision is just the opposite: that Ms. Saks could have recovered for her injury if operation of the Air France pressurization system had been abnormal.

The contrary view would lead to absurd results. Thus, for example, it would immunize an airline from liability for an elderly passenger's heart attack even if the airline caused the

attack by falsely telling passengers that the plane was going to crash. Or, to bring the example closer to this case, it would allow Olympic to avoid liability for the death here even if it had ordered Dr. Hanson to sit in the *smoking* section of the aircraft or had caused his asthma attack by setting off an uncontrolled fire in the aircraft galley. Although a passenger with no pre-existing condition might escape injury in those circumstances, the fact remains that something "unusual" and "unexpected" happened during the flight to cause the injury that occurred. Once that has been established, the Convention provides no basis for using Article 17 as a barrier against passengers on the basis of their prior medical histories. *See generally* Restatement (Second) of Torts § 461 (1965); *Gibson v. County of Washoe, Nev.*, 290 F.3d 1175, 1192 (9th Cir. 2002) (referring to "time-honored legal principle that a wrongdoer takes his victim as he finds him") (internal quotation marks omitted); *Meyers v. Wal-Mart Stores, East, Inc.*, 257 F.3d 625, 632 (6th Cir. 2001) (same).

Petitioner argues that the decision of the Third Circuit in *Abramson v. Japan Airlines Co., Ltd.*, 739 F.2d 130 (1984)—cited by this Court in *Saks*, 470 U.S. at 405—demonstrates otherwise. But the Third Circuit did not hold that a prior medical condition bars the finding of an "accident" under Article 17: it held only that "[i]n the absence of proof of abnormal external factors, aggravation of a pre-existing injury *during the course of a routine and normal flight* should not be considered an 'accident' . . . ." 739 F.2d at 133 (emphasis added). Indeed, each of the cases cited for that proposition involved injuries that had arisen without any demonstration of abnormal activity external to the passengers themselves. *See Warshaw v. Trans World Airlines*, 442 F. Supp. 400 (E.D. Pa. 1977) (injury resulting from normal change in cabin pressure); *MacDonald v. Air Canada*, 439 F.2d 1402 (1st Cir. 1971) (injury resulting from fall apparently caused by passenger's internal condition). This Court thus correctly included *Abramson* (and *MacDonald*) among a list of cases

that "refuse[d] to extend the term ['accident'] to cover routine travel procedures that produce an injury due to the peculiar internal condition of a passenger." *Saks*, 470 U.S. at 405; *see also id.* (parenthetically describing *Abramson* as holding that "sitting in airline seat during normal flight which aggravated hernia not an 'accident'"). Those cases say nothing about proper application of the term when the travel procedures are not "routine" or "normal."[14]

Pre-existing conditions, of course, may be important to the ultimate question whether the carrier is liable for a death or injury. In particular, the prior medical condition of a passenger may affect whether the particular "accident" in question actually caused his or her injury. When a passenger suffers a heart attack during an uncommonly turbulent flight, the carrier may well be able to demonstrate that the severe turbulence—though an unusual happening and thus an "accident"—nonetheless had little or nothing to do with the attack. Likewise, a passenger may suffer a serious injury aboard a flight even though the flight crew has scrupulously observed all standard procedures. The more serious the pre-existing condition, the more persuasive these "lack of causation" arguments are apt to be.

Not surprisingly, the question of causation was a central issue in this case. Throughout the proceedings below, Olympic maintained that Dr. Hanson had died as a result of his allergies to food, not smoke, and further argued that the smoke in the cabin was too mild to be a significant factor in his death. Although the Ninth Circuit stated that the issue of

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[14] We note that, while the plaintiff in *Abramson* had alleged that the "refusal to aid him" was an unusual event, *see* 739 F.2d at 132, he failed to establish that any acts or omissions by the flight crew were unusual under the circumstances presented there. In particular, he did not establish that the flight crew had deviated from accepted industry or company standards by failing to find him a suitable location for his self-help remedies. The findings here, of course, do establish such a deviation.

causation was "a close call," Pet. App. 17a, it ultimately chose to resolve that issue on the basis of the findings of the district court. Those findings, which the court of appeals held not to be clearly erroneous, Pet. App. 17a, were that "Dr. Hanson's death was caused, at least in significant part, by smoke inhalation which triggered a severe asthmatic reaction" and that "Olympic's failure to move Dr. Hanson caused Dr. Hanson's death." Pet. App. 59a.

III. A FLEXIBLE READING OF ARTICLE 17 IS CONSISTENT WITH THE OVERALL OBJECTIVES OF THE CONVENTION.

A. A prominent theme advanced by Olympic is that, after this Court held that remedies under the Convention are exclusive, *see Tseng*, 525 U.S. at 167-76, various lower courts improperly expanded the definition of "accident" to assure that plaintiffs would be able to obtain relief. *See* Pet. Br. 28-31. To the extent that Olympic is saying that courts should not rewrite the Convention simply to reach desired results, its position is obviously correct. *See Saks*, 470 U.S. at 406. But, to the extent that Olympic means to say that *Tseng* must be ignored in determining what signatories to the Convention intended, it is just as clearly wrong.

This Court has said that the aim of treaty interpretation is "to give the specific words of the treaty a meaning consistent with the shared expectations of the contracting parties." *Saks*, 470 U.S. at 399; *see also Washington v. Washington State Commercial Passenger Fishing Vessel Assoc.*, 443 U.S. 658, 675 (1979) ("it is the intention of the parties . . . that must control any attempt to interpret the treaties"). Thus, while the process of interpretation properly focuses on the words used by the signatory nations, it does so in the context of the structure and objectives of the treaty as a whole. Part of that broader inquiry, in turn, looks to the practical effects that competing interpretations of treaty language might produce.

An interpretation that leads to incongruous results is properly rejected. *See generally Chan v. Korean Air Lines, Ltd.*, 490 U.S. 122, 130 (1989).

That principle of treaty interpretation is evident in *Tseng* itself. There, the Court was faced with a choice between two interpretations of the Convention, one making the Convention the sole avenue of recourse for passengers on international flights and the other allowing certain suits to proceed separate and apart from the Convention. Although the latter interpretation had support (indeed, perhaps, greater support) in the specific language of the treaty, the Court nevertheless adopted the former interpretation, in large part because it was more consistent with the overall objectives of the Convention. *See* 525 U.S. at 170-73. The Court specifically noted that a reading of the treaty permitting suits outside the Convention "could produce several anomalies" that the signatories were unlikely to have intended. *Id.* at 171.[15]

The same potential exists here. If Olympic were correct about its view of the term "accident," it would have the effect of sheltering Olympic from liability for a death caused by its willful misconduct, even though the Convention plainly appears to contemplate liability for deaths caused by carriers that cannot make the Article 20(1) showing of due care. Furthermore, it would leave Ms. Husain without any remedy at all for her husband's death. While that is perhaps not an inconceivable result—the Convention does leave passengers who suffer only psychological injury without a remedy, *see Eastern Airlines, Inc. v. Floyd*, 499 U.S. 530 (1991)—it seems very unlikely that the signatories intended that out-

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[15] The plaintiff in *Tseng* argued that the view ultimately adopted by the Court would produce an even greater "anomaly": relieving carriers of liability for willful misconduct. The Court, however, indicated that this anomaly would not arise, emphasizing its prior admonition that the term "accident" be "flexibly applied." 525 U.S. at 172 (quoting *Saks*, 470 U.S. at 405).

come in a liability scheme that deals broadly and comprehensively with responsibility for death and bodily injury. *Cf. Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 251 (1984) ("difficult to believe that Congress would, without comment, remove all means of judicial recourse to those injured by illegal conduct"); *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 487 (1996) (same).[16] And, it seems especially improbable that they would have sought to achieve that end by using the word "accident" in a way contrary to its normal meaning, rather than by making their intention explicit in the provisions specifically designed to relieve carriers of their liability.

Olympic correctly points out (Pet. Br. 14) that one purpose of the Convention was to limit the liability of international air carriers. But that does not mean that the Court must adopt any possible interpretation of the Convention that lessens liability. The Convention also sought to advance "the interests of passengers seeking recovery for personal injuries," *Tseng*, 525 U.S. at 170, and that interest must be taken into account as well. *Id.* Here, it seems appropriate to strike the balance by permitting passengers to proceed with claims based on the failure of a carrier to observe governing industry standards, placing on the carrier the burden of showing that it had good reason for that departure. That balance properly reflects the intention of Article 17 to create broad presumptive liability in the event of unusual flight-related occurrences, as well as remaining faithful to the original fault-based liability scheme of the Convention as a whole.

B. Olympic also claims that "post-ratification" history shows that the term "accident" should be given a narrow

[16] In contrast, the decision not to impose liability for purely psychological injuries is readily understandable given the novelty of international air travel at the time that the Convention was drafted. That is particularly so in light of the traditional legal notion that psychological injury in the absence of accompanying physical injury was not compensable. *See Eastern Airlines v. Floyd*, 499 U.S. at 544-45.

meaning. But it shows nothing of the kind. All that the history demonstrates is that various nations have been reluctant to do away with the term "accident," resisting efforts to replace it with the terms "occurrence" or "event." *See* Pet. Br. 32-35. Those discussions, in turn, prove only that "accident" is a narrower term (an *unusual* occurrence or event), a point that this Court has already made in *Saks* and that is not in dispute here.[17]

While post-ratification history confirms that "accident" is a narrower term than "occurrence" or "event," it sheds no comparable light what "accident" actually means. Although there are occasional remarks about its possible scope—in 1953, for example, a United States delegate indicated that "failure of the pressurization [system] . . . would seem to be included within the word 'accident'" (*see* ICAO Legal Committee, Minutes and Documents of the Ninth Session, Rio de Janeiro, 25 August—12 September 1953, ICAO Doc. 7450-LC/136-1 at 71 (1954))—the gist of most post-Warsaw discussions is that Article 17 need not be further expanded, not that it was peculiarly restrictive to begin with. In particular, there is nothing to demonstrate that the term "accident" must be given other than its ordinary meaning of an unusual or unexpected event. Thus, even if this kind of uncertain later history were to be accorded weight here, it would only reinforce the definition of "accident" that this Court adopted in *Saks*.

[17] The Montreal Convention, recently ratified by the Senate, retains the term "accident" in a somewhat reworded provision: "The carrier is liable for damages sustained in case of death or bodily injury of a passenger upon condition only that the accident which caused the death or injury took place on board the aircraft or in the course of any of the operations of embarking or disembarking." Convention for the Unification of Certain Rules for International Carriage by Air, Done at Montreal, May 28, 1999, Treaty Doc. 106-45 (ratified July 31, 2003), Art. 17.1.

The post-ratification history, however, does provide an illuminating counterpoint to Olympic's effort to escape liability for its own misconduct. For, while Olympic is urging a position that would *reduce* carrier liability for deaths or injuries caused *by fault*, the post-ratification trend has been in the opposite direction: that is, to *increase* liability for injuries or deaths that occur *without fault*. Thus, in addition to promoting efforts to raise the liability ceilings, certain nations, including the United States, have repeatedly urged modifications to the Convention that would impose at least some liability without regard to fault on the part of the carrier. To a considerable degree, those efforts have been successful. Thus, for example, most airlines agreed to waive their Article 20(1) defenses in the 1966 Montreal Interim Agreement, *see* Agreement CAB 18900, approved by Civil Aeronautics Board Order No. E-23680, May 13, 1966, 31 Fed. Reg. 7302 (1966), and a number of airlines subsequently consented to a similar waiver as part of the International Air Transport Association Agreement. *See* International Air Transport Association Intercarrier Agreement on Passenger Liability, approved by D.O.T. Order 96-11-6 (D.O.T. Nov. 12, 1996). Most recently, that principle was embodied in the 1999 Montreal Convention, which provides that carriers are liable, without regard to their degree of care, for damages up to a specified amount. *See* 1999 Montreal Convention Art. 21.

This course of events reflects a growing consensus that carriers should bear at least some liability in the event of "unusual" occurrences, even when they might be able to meet the standards of a "due care" defense. Conspicuously absent, however, is any comparable momentum for what Olympic asks here: the making of exceptions to liability when carriers are at fault. This absence is hardly anomalous. Because the Convention was constructed as a fault-based system, the reasonable working assumption is that carriers are liable, and

should be liable, for deaths or bodily injuries that are their fault. The interpretation of "accident" proposed by Olympic is directly contrary to that basic approach.

Olympic also seeks to use language in the (unratified) Guatemala City Protocol to demonstrate that carriers should not be liable for injuries or deaths "resulting solely from the state of health of the passenger." *See* Pet. Br. 34 (quoting Guatemala City Protocol Art. IV). But we do not contend, and the courts below did not find, that Olympic is liable for a death resulting "solely" from Dr. Hanson's asthma. The plain fact is that, had Dr. Hanson been provided a seat distant from the smoke, his asthma would not have claimed his life. *See* Pet. App. 60a ("If Ms. Leptourgou had moved Dr. Hanson out of the vicinity of the smoking section, he would not have died aboard Flight 417"). Thus, regardless of the language of the Guatemala City Protocol, Olympic would still be responsible for Dr. Hanson's death.

In the end, Olympic never really comes to grips with what it did in this case. Simply put, Olympic caused Dr. Hanson's death by needlessly confining him to a seat in the midst of heavy, life-endangering smoke. Its inexplicable decision to do so—in direct contravention of industry practice and its own policy—was not the "usual, normal, and expected operation of the aircraft." *Saks*, 470 U.S. at 406. It was an "accident" under the terms of the Convention, and the decision below, making that determination, was correct.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully Submitted,

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